Supreme Court, U.S.
FILED

No. 051187

MAR 14 2006

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA SAMUEL,

Petitioner,

v.

SUPERIOR MACHINE COMPANY OF SOUTH CAROLINA, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Chalmers C. Johnson
Counsel of Record for Petitioner
Chalmers Johnson Law Firm, LLC
182 East Bay Street, Suite 203
Charleston, South Carolina 29401
TEL (843) 723-8288
FAX (843) 853-8749

QUESTIONS PRESENTED

1. **Whether the Court should consider all race discrimination claims under 42 U.S.C. 1981a mixed motive cases, precluding the use of the McDonnell Douglas Shifting Burden test at Summary Judgment.**

2. **Whether the Court should consider evidence of pretext as to the employer's stated reason for an adverse employment action to be evidence of discriminatory motive, pursuant to Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, 120 S.Ct. 2097 (2000).**

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Other Authorities

H.R.Rep. No. 102-40(I), at 46 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 584) 21

OPINIONS BELOW

The Court of Appeals wrote an unpublished Opinion in this case, affirming based on the reasoning in the District Court Judge's Order entered on November 18, 2004. A copy of the unpublished Opinion is included in the Appendix, as is the Order of November 18, 2004 by Judge Harwell, United States District Court Judge.

JURISDICTION

On December 16, 2005, the Appeals Court for the Fourth Circuit affirmed the District Court's Order granting Summary Judgment to the Defendant in an unpublished opinion. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

None.

STATE STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the U.S. Code:
42 U.S.C. 2000e and 42 U.S.C. 1981a

STATEMENT OF THE CASE

Superior Machine Company of South Carolina, Inc, is located in Florence, South Carolina. Its principal line of business is the repair and fabrication of heavy industrial machinery. Superior employed (as of 2003) just under 150 persons in Florence, SC. The majority of the employees in the Florence plant are classified as either welders, riggers, or fitters. There were several different departments in the Superior Machine plant The Heavy Machine Shop, The Paper mill Repair Shop, Pump Shop, Shipping and Receiving shop, Planning, and Engineering. Samuel worked mainly in the Fabrication department, which consists of the Panel Shop and Heavy Fabrication.

The Defendant employs two types of employees, permanent and temporary. Employees are hired through a temporary agency (Spherion) and then offered permanent employment if they meet certain requirements. Mr. Miller, the plant manager, testified in order to go from a temporary employee to a permanent employee must show an ability to do the job, ability to be on time, and the ability to handle the work load.

Joshua Samuel (Petitioner) is an African American man. He has been a welder since about 1980. Samuel received a certification in welding from a technical college, gained experience working as a welder for construction companies like Daniels, BE&K, and NNI. Samuel worked in welding at H.B Robinson Nuclear plant in Hartsville, SC, before accepting a position with Superior Machine in 1986 as a welder. Samuel was employed with Superior (with some intermittent breaks in employment) until his termination in December 2001. In 1986, Samuel went to Superior Machine seeking employment. He filled out an employment application, but was told, upon filling out the application, that he would have to take and pass a welding test. Samuel did pass the test. However, After passing the test, Larry Miller, a white supervisor for Superior Machine, informed the Plaintiff that, although he would be hired for the job, his certification did not "mean" anything in the eyes of Superior's management. Samuel began to work as a welder, and performed well. He worked his way up through raises and good performance, from $6.00 per hour in 1986 to $12.00 per hour in 1997.

During the Samuel's employment he experienced incidents of racial harassment from a worker and later supervisor named Barry Hardee, a white male. Prior to 1994, Samuel and Hardee worked in the same shop but Hardee was not Samuel's supervisor. In January of 1993, Barry Hardee approached Samuel and showed him a list, which Hardee said indicated that Samuel was to be put under Hardee's direct supervision. Hardee, after showing Samuel the list, told Samuel that he "had him now." Rather than be transferred to a position directly subordinate to Mr. Hardee, Mr. Samuel agreed to take a voluntary layoff on January 14, 2003.

In December 1994, After having worked as a welder for other employers, Samuel re-applied for a position with Superior. He returned to work with Superior at a rate of $10.50 per hour. After returning to Superior in December of 1994, Samuel was assigned to a shop under the supervision of Charles Larrimore. Even though he was under Larrimore's direct supervision, Samuel occasionally came into contact with Hardee, as he was sent to Hardee's shop when needed. On just about each and every time that

Samuel was sent to work with Hardee, Hardee subjected Samuel to some type of racial harassment. Samuel, on many occasions, while working for Superior, reported Hardee's racist behavior to all of management including but not limited to management members, James Odom, Vaughn Williams, and Mr. Jackson. On several occasions the Plaintiff was told by Hardee, "you ain't learn how to weld yet boy." On one occasion, Barry Hardee showed Samuel a handful of pocket change and told Samuel that the change was money collected to support the Ku Klux Klan. Samuel, who was outraged, made a report of racial harassment to George Turner, a supervisory employee. Rather than address the issue, instead of taking any remedial action at all, Turner's reaction to the Samuel's report was to inform Samuel (as if he did not already know) that "Barry Hardee don't like blacks." Samuel has observed that he enjoyed working at Superior Machine, and would have considered it a good place to work if it were not for he racist work environment.

Samuel's wife had severe medical problems from 1998 (continuing even today), which included,

among other things, cancer. Samuel was absent some days in order to accompany her to her medical treatments. Samuel had taken time off only when there was no welding work to be done at the plant, and provided medical notes, substantiating the reason for his absences. Nonetheless, on May 11, 1998, he received a warning for not working required hours. Superior management told Samuel that the Doctor's notes meant nothing to them. With his wife's medical condition in a continuing downward spiral, Samuel received a second warning for absenteeism on October 8, 1998 (despite having a valid medical note to explain the absence). Superior Machine terminated Samuel in October 1998. Samuel then accepted a job with another company (as a welder) called Techno Steel for a time. Mr. Samuel then attempted to re-apply for a welding position with Superior Machine. He was informed that, at that time, Superior was not accepting applications for permanent positions. Samuel was advised to apply for a position with Superior through a temporary employment agency called Spherion.

Samuel applied and was accepted to work for

Superior Machine. He was returned to his prior post in the Summer of 1999, where his supervisor was, once again, Charles Larrimore. While working under Larimore, Samuel performed well, and was assured, by his supervisor that he was of great value to Superior, as a welder. Samuel was frustrated because, although Superior seemed to recognize his skill and value to the plant as a skilled welder, the Respondent had declined to allow him to become a permanent employee. Frustrated with the company's apparent refusal to accept him as a permanent employee for about two years, Samuel resigned on June 4, 2001.

On July 16, 2001, about six weeks after the June 4, 2001 resignation, Samuel did return to Superior Machine, and resumed his welding job. His employee file indicated that he was still a temporary employee, although it did not mention Spherion (the temporary agency) at all. After his return to work, Samuel was still under the supervision of Mr. Larrimore, as a welder.

Barry Hardee, who was still working for Superior, despite Samuel's complaints of racial harassment against him, was promoted to a supervisory position in December of 2002. One week after Hardee was promoted, David Sorrell, another supervisor, suspended Samuel for a week, alleging that Samuel had used the wrong type of weld on a certain piece of steel. Samuel had completed a weld with three beads. The supervisor claimed hat he had been instructed to do a one bead weld. Samuel was upset that he was sent home because a white worker, Randy Riner, had just completed an identical weld on the same (or an adjoining or similar piece), and was not disciplined at all. The incident that lead to Samuel being sent home involved a weld on a bucket. The project was not one to which Samuel had been originally assigned. He was working on another project, and was told to go assist Randy Riner with the bucket weld. Samuel was not given any instructions as to what kind of weld to use on the particular piece, however, Riner, who was already working on the project, was clearly using a three-bead weld. Samuel observed Riner welding three beads and proceeded to weld three beads as well, as Samuel was working on

the same piece and on the same project. A supervisor over that project, David Sorrell, when he saw the type of weld, approached and began to yell and curse at Samuel, claiming that Samuel had performed the wrong type of weld. Riner was not disciplined, although he apparently had to gouge off the three bead weld and use a one bead weld. Samuel was given a suspension without pay for the week.

Samuel returned from suspension. He was approached by another supervisor, who told Samuel that, while he would never have believed it before, he was now convinced that Barry Hardee really did not like Samuel. Barry Hardee terminated Samuel within a couple of hours of Samuel's return to work after the suspension. Samuel left the plant, and subsequently successfully sought unemployment benefits.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER, IN LIGHT OF THE DECISION FROM DESERT PALACE, INC. V. COSTA, 539 U.S. 90 (2003)., IT IS APPROPRIATE TO APPLY THE MCDONNELL DOUGLAS SHIFTING BURDEN TEST TO RACE DISCRIMINATION CASES UNDER 42 U.S.C. 1981a.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER, IN LIGHT OF THE DECISION FROM REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 530 U.S. 133, 120 S.Ct. 2097 (2000)., EVIDENCE OF PRETEXT AS TO THE EMPLOYER'S STATED MOTIVE FOR TAKING AN ADVERSE EMPLOYMENT ACTION SHOULD BE CONSIDERED PRIMA FACIE EVIDENCE OF DISCRIMINATORY INTENT AT THE SUMMARY JUDGMENT STAGE.

I. The Court Should have considered this case a mixed motive case, and should not have applied the McDonnell Douglas Shifting Burden test to the race discrimination claims brought under 42 U.S.C. 1981a as a means to dismiss at Summary Judgment.

A. The 1991 Amendments to the Civil Rights Act of 1964 preclude the changing of the burdens of proof clearly stated in the statute, thus

making even circumstantial cases subject to a mixed-motive analysis, and not subject to the McDonnell Douglas Shifting Burden test.

In the Order herein appealed, the District Court Judge found that Samuel had, in fact, established a prima facie case of race discrimination as to his termination. The Court then applied the McDonnell Douglas Shifting Burden test, dismissing the case upon a finding that Samuel had failed to make a showing of pretext. The Petitioner argues that, once a prima facie case is established, in a race discrimination case, Summary Judgment should be denied.

In this case, Samuel has alleged race discrimination under 42 U.S.C. Section 1981. This section of the U.S. Code was originally enacted in 1866 to protect individuals against race discrimination. Section 1981 prohibits racial discrimination by establishing the rights of all persons "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. 1981. The Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq) was passed roughly a hundred years later, but was much more detailed as to the enforcement of the

prohibition against discrimination (and covered other types of discrimination). Because both laws prohibit race discrimination in employment, and Congress saw fit, in 1964 (and in amendments in 1991), to set forth more detailed guidance and mandates as to the method of enforcement of the prohibition of discriminatory actions in employment, the Courts have applied the Title VII analysis framework. St. Mary's Honor Center v. Hicks, 113 S.Ct 2742, 2747 (1993). Thus, the Petitioner argues that the enforcement provisions under 42 U.S.C. 2000e, including burdens of proof and affirmative defenses, should be applied to claims for race discrimination and retaliation brought under 42 U.S.C. 1981, just as the former McDonnell Douglas test, developed to apply to Title VII claims initially, was applied to 42 U.S.C. 1981 cases.

The United Sates Supreme Court had occasion to review and comment on the 1991 amendments to the Civil Rights Act of 1964, in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). Though the decision focuses only on Title VII, it would be nonsensical to argue that race claims under 42 U.S.C. 1981 should be analyzed under an identical framework to Title VII, and then draw back from that stance once the Court

interprets the amendments to that very statute as invalidating part of the analysis. It is somewhat of a misrepresentation to say that the Desert Palace decision has changed the way a Title VII case should be analyzed. A close reading of the Supreme Court's opinion shows that the actual agent of change was the 1991 amendment to the Civil Rights Act of 1964, which added sections 42 U.S.C. 2000e-2(m) and section 42 U.S.C. 2000e-5(g)(2)(B). All the Court seems to be really doing in the Desert Palace Opinion, is acknowledging that the statutory language found in those two sections is clear and unambiguous, and explaining how those sections were supposed to have been applied during the 12 years between the amendments and the Opinion, and from now on.

It appears that the 1991 amendment was made shortly after a strangely divided opinion in Price-Waterhouse v Hopkins, 40 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) left us with a framework under which the Court could require a showing of direct evidence in order for a Plaintiff to continue on with a case based on prima facie proof of discriminatory motive as the basis for an adverse employment decision. In those cases where the

Defendant did not outright admit to having an unlawful motive (direct evidence in a cause of action based on proving what someone's motives for doing something would really come down to that), the Plaintiff was relegated to jumping through hoop after hoop to make a circumstantial case (ie. the elements necessary to prove prima facie cases by circumstantial evidence alone were developed). The shifting burden test was then developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973), which not only raised the burden of proof (to avoid being subjected to the shifting burden) to a requirement of direct evidence, but also granted the Defendant the right to overcome a prima facie case of discrimination without even presenting proof at all. The shifting burden test allowed the Defendant to render the prima facie proof presented by the Plaintiff impotent, by simply producing, or articulating, a non-discriminatory reason for the adverse employment action. This basically allowed the Defendant to just throw out as many marginally believable reasons for the adverse employment action as it could think of, whether the reasons were true or not. Not only was the Defendant not called upon to present any evidence of the

articulated non-discriminatory reasons, but the Court could circumvent the Rule 56 requirement of finding no genuine issue of material fact before making a judgment as a matter of law. In other words, in cases in which the Plaintiff had actually produced evidence from which a reasonable juror could find that the decision to take adverse employment action was motivated by discriminatory considerations, the Judge could legitimately ignore that fact and dismiss the whole case as long as the Defendant introduced an unsupported articulation which the Plaintiff could not specifically disprove. In 2000 the United States Supreme Court authored an opinion in Reeves v. Sanderson Plumbing Products, Inc.530 U.S. 133, 120 S.Ct. 2097 (2000). In that Opinion, Justice Ginsburg recognized and voiced the fact that circumstantial evidence of discrimination is no less credible or potent a method to prove a case than direct evidence. The Court recognized that whether the employer "was in fact motivated by discrimination is of course for the finder of fact to decide." Justice Ginsburg, Reeves v. Sanderson Plumbing Products, Inc.530 U.S. 133, 120 S.Ct. 2097 (2000)

42 U.S.C. 1981a does not sate that the

Defendant in an employment discrimination case has any less of a burden of proof or require the Plaintiff to meet any higher burden than in any other type of civil case. It does not follow, therefore, that Congress intended any shifting of the burden of proof at any part of the case analysis. The Supreme Court, in Desert Palace, makes this same observation concerning Title VII. In the Desert Palace opinion, the Court discusses two sections of the amendment. The first, 42 U.S.C. 2000e-2(m), provides, among other things, that an unlawful employment practice is established "when the complaining party demonstrates that ...race... was a motivating factor for any employment practice, even thought other factors also motivated the practice." When read plainly, this section says a Plaintiff can prove a prima facie case under Title VII by simply showing evidence from which a reasonable juror could find that an protected characteristic of the Plaintiff was considered as part of the reason for any employment decision (not just adverse employment actions, either). The language from 42 U.S.C. 1981 is no less clear. This plain language simply does not mesh with the standards that the Courts have been applying, requiring direct proof for a mixed motive case, and

setting up series of individual elements to be proven piecemeal in order to establish circumstantial cases. Neither statute, on its face, calls for any more than a straight forward analysis of whether or not the Plaintiff has produced proof from which a reasonable juror could find that race was a factor in the employer's decision to take an employment action against the Plaintiff. The Court very clearly explains that, if circumstantial evidence is good enough to prove a criminal case, in which the State has a "beyond a reasonable doubt" standard of proof and is seeking to impair the constitutional rights of a citizen (sometimes even his or her life itself), then there is no reason why a Civil Rights Plaintiff should be restricted from using the same type of evidence to prove a civil case. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

B. The "shifting burden" analysis is actually an affirmative defense, which does not impact on liability, and can not be used as a basis for dismissal of a Title VII case.

The second amendment that the Court discusses in Desert Palace is 42 U.S.C. 2000e-2(m). This one clearly spells out how the shifting burden test is ***supposed*** to be used. As this shifting burden test,

itself, was developed to apply to Title VII cases, it should follow that, if its use defeats the purpose of Title VII, it would also defeat the purpose of 42 U.S.C. 1981. In the past, the Courts have allowed Defendants to articulate a non-discriminatory reason for an adverse employment action (as discussed above, no proof was necessary, and therefore, no allegation that there is no genuine issue of material fact need be made). If the Plaintiff was not able to prove that reason to be pretextual, the Court would simply dismiss the case altogether, finding no liability as a matter of law. Well, the statute does not read that way at all. Rather, Congress has clearly stated that the burden that shift to the employer requires the employer to "demonstrate" (or produce evidence sufficient to create a genuine issue of material fact) a reason for the adverse action that was not related to any protected characteristic of the Plaintiff, and then pursue it like an affirmative defense would be pursued. The statutory language actually specifically calls it an affirmative defense. 42 U.S.C. 2000e-5(g)(2)(B). The Courts, by accepting the Defendant's unsupported "articulated" reasons as gospel under the auspices of the McDonnell Douglas Shifting burden test, have been acting outside of and in

violation of Congressional mandate for over a decade.

In addition to requiring proof and treating the shifting burden test as an affirmative defense, the statutory amendment mandates that, even a successfully proven asserted non-discriminatory reason for an adverse employment action would not call for the dismissal of the case. Instead, the affirmative defense, if successful, would only limit damages in the case, not absolve the Defendant of liability. "the employer has a limited affirmative action defense that does not absolve it of liability, but restricts the remedies available to the Plaintiff. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs." 42 U.S.C. 2000e-5(g)(2)(B).

Put simply, the Courts have been doing three things wrong in the Summary Judgment analyses of Title VII cases, and 1981a cases, where the Plaintiff has presented facts from the record sufficient to support a prima facie case. First, the Courts should not be accepting a Defendant's unsupported, articulated, non-discriminatory reason for taking an adverse employment action as a matter of undisputed fact, unless it is actually undisputed (no genuine issue of

material fact). Second, the Courts, should not be considering the inference of discrimination from Plaintiff's prima facie case of discriminatory motive (where the prima facie case has evidentiary support in the record) to be "rebutted" even where the Defendant does present a legitimate non-discriminatory reason for an adverse employment action. Third, the Courts should not be granting Summary Judgment as to liability, even where the Defendant does prove, at Summary Judgment, that it would have terminated Plaintiff for some reason not related to the protected characteristic. In a nutshell, the Desert Palace decision seems to be recognizing that, in Civil Rights/ employment law cases, the Courts have been exceeding their authority as gatekeepers.

The Ninth circuit, in Dare v. Wal Mart Stores, Inc. 267 F.Supp 987 at 995 (Minn. 2003), concluded, in a logical analysis of the legislative history of the 1991 amendments to Title VII, that "the legislative history evinces a clear intent to overrule Price Waterhouse." Desert Palace, Inc. v. Costa, 299 F.3d 838, 850. A portion of the legislative report accompanying the Act (titled "the need to overturn Price Waterhouse") reflects congress' concern that

"the inevitable effect of the Price Waterhouse decision [was] to permit prohibited employment discrimination to escape sanction under Title VII." Dare v. Wal Mart Stores, Inc. 267 F.Supp 987 at 995 (Minn. 2003). (quoting H.R.Rep. No. 102-40(I), at 46 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 584). The report continued: "[T]he effectiveness of Title VII's ban on discrimination on the basis of race, color, religion, sex, or nation origin has been severely undercut by the recent Supreme Court decision in Price Waterhouse v. Hopkins." Id. Despite this intent, the Courts across the country, including this Court, continued to follow the concurring opinion written by Justice O'Connor. The recent Supreme Court decision finally gives effect to the Civil Rights Act of 1991. Dare v. Wal Mart Stores, Inc. 267 F.Supp 987 at 995 (Minn. 2003).

II. The Petitioner has presented evidence of pretext as to the employer's stated reason for discharging Samuel. This should be considered prima facie proof of discriminatory intent on the employer's part.

The Magistrate, in the Report and Recommendation, applying the McDonnell Douglas

Shifting Burden Test, accepted Superior Machine's assertion that it had decided to downsize its temporary workforce. In fact the Magistrate Judge found that this assertion was undisputed. In the Objection to the Report and Recommendation, Samuel specifically points out that the affidavit testimony upon which this assertion is based, is contradicted by deposition testimony, which shows that, after Samuel's termination, Superior continued to hire and promote temporary employees. The Judge, in the final Order dismissing this case on Summary Judgment, included a footnote, acknowledging that, in the Objection, Samuel had pointed out that there was deposition testimony in the record, from current Superior employees, which contradicted the affidavits upon which the finding (that Superior's assertion of downsizing its temporary work force was undisputed) was based. In the same footnote, however, the Judge states "However, while this blanket allegation is made, there is no reference made to specific portions of the depositions to support this allegation,"

The deposition testimony to which Samuel was referring in the Objection does exist, and was part of the record. In his deposition testimony, Barry Hardee,

a current (at the time of the deposition) supervisor, and Samuel's last supervisor, testifies that his department still had three temporary employees. One was a welder, who had been hired on after Samuel was terminated.

The Fourth Circuit has repeatedly emphasized the drastic nature of the Summary Judgment remedy and have held that it should not be granted unless it is perfectly clear that there are no genuine issues of material fact in the case. Ballinger v. North Carolina Agr. Ext. Ser., 815 F.2d 1001, 1004 (4th Cir. 1987), *Citing* Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir. Cert. denied 342 U.S. 887 (1951). In Ballinger, the Court admonishes that "'Summary Judgment is seldom appropriate wherein particular states of mind are decisive elements of [a] claim or defense.' courts must take special care in cases such as the instant one because motive is often the critical issue in employment discrimination." Id. At 1004, *Citing* Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979).

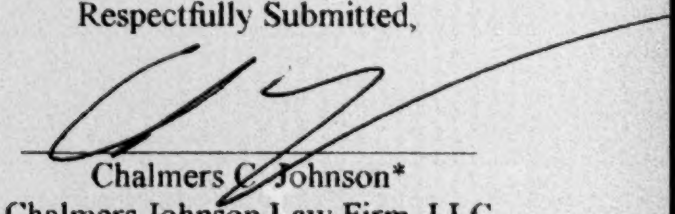
In this case, especially with Samuel having Ben the non-moving party and entitled to have all factual and legal inferences drawn in his favor at

Summary judgment, the Petitioner argues that the District Court erred in choosing not to review the record or at least order Samuel to identify, with more specificity, an issue of fact which the Court acknowledged he had identified, before making a finding that there was no genuine issue of material fact on an issue which, in the end, was dispositive to the case. On Page 8 of the 11-18-04 Order, the judge acknowledges that the alleged decision to "phase out" temporary employees was the Defendant's articulated reason upon which he based his decision to dismiss under the Shifting burden test. Because the Court found that the record did support a prima facie case of race discrimination, it is clear that the case for race discrimination was dismissed solely upon a finding that Samuel had failed to establish pretext as to Superior's claim that the temporary workforce was being phased out. Had the Court recognized that there was evidence which would present a genuine issue of material fact on this issue, the Court would likely not have granted Summary Judgment.

CONCLUSION

For the reasons set forth above, Petitioner JOSHUA SAMUEL respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully Submitted,



Chalmers C. Johnson*
Chalmers Johnson Law Firm, LLC
182 East Bay Street, Suite 203
Charleston, SC 29401
TEL (843) 723-8288
FAX (843) 853-8749

*Member, Supreme Court Bar
Counsel of Record for Joshua Samuel

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Chalmers C. Johnson
Counsel of Record for Petitioner
Chalmers Johnson Law Firm, LLC
182 East Bay Street, Suite 203
Charleston, South Carolina 29401
TEL (843) 723-8288
FAX (843) 853-8749

APPENDIX
Rule 14(i)

Rule 14 (i)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed

Order of November 18, 2004, U.S.D.C. 1

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Rule 14(vi) Any other material the petitioner believes essential to understand the petition

Plaintiff's Objection to the Magistrate's Report and Recommendation 18

1. Order Granting Summary Judgment, 11-18-04

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Joshua Samuel,	)Civil Action No. 4:02-1971-27
	)
Plaintiff,	)
	)
Vs.	) ORDER GRANTING
	)SUMMARY JUDGMENT
Superior Machine	)
Company of South	)
Carolina, Inc.,	)
	)
Defendant.	)
	)

Procedural History

In this matter, the plaintiff filed an action I the Court of Common Pleas, Florence County, South Carolina, alleging several causes of action under South Carolina law and disparate discipline and race discrimination in violation of 42 U.S.C. 1981a. Defendant removed the action to this court on June 7, 2002. Defendant filed its motion for summary judgment and supporting memorandum of September 24, 2003.

This matter is now before the undersigned for

review of the Report and Recommendation ("the report") filed by United States Magistrate Judge Thomas E. Rogers, III, to whom this case had previously assigned pursuant to 28 U.S.C. 63 and Local Rule 73.02(B)(2)(g). In his report, Magistrate Judge Rogers carefully considers these issues and recommends that the defendant's motion for summary judgment be granted with regard to the Plaintiff's federal claims and that the remaining state law claims be remanded to the State Court for further proceedings. Plaintiff filed objections to the Report on August 30, 2004.

In his objections the plaintiff alleges that the Report's finding that the defendant is entitled to summary judgment is in error because he was performing at the level his employers expected and that he and Riner were similarly situated employees.

In conducting this review, the Court applies the following standard:

> The magistrate judge makes only a recommendation to the Court, to which ant party may file written objections... the Court is not bound by the recommendation of the magistrate judge, but, instead, retains responsibility for the final determination. The court is required to make a de novo determination of those portions of the report or specified findings or recommendations as to which an objection is made. However, the Court is not required to review, under a de novo, or any other standard, the factual report and recommendation to which no objection is addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether to not objections have been filed,

in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. Of the City of Columbia, 791 F.Supp. 137, 138 (D.S.C. 1992) (citations omitted).

Facts

The Court agrees with the factual and procedural background as set forth by the Magistrate judge in his recommendation. The Court therefore adopts the Magistrate's version of the facts in this case to the extent such facts are not specifically included herein.

The Plaintiff was employed as a welder with the Defendant, off and on, from 1986 until his termination in December of 2001 when he was a temporary employee hired through Spherion. Defendant states that it now employs approximately 143 people in its Florence facility and that a majority of its employees are classified as either welders, riggers, or fitters. Defendant employs both permanent and temporary employees. All employees are hired through a temporary agency and some are later offered permanent employment.

In 1986, the plaintiff, an African American, filed out an application with the Defendant. After taking a test, plaintiff was hired as welder, and was employed periodically with the defendant until his termination in 2001. When he was first hired he was paid $6.00 an hour. Over the tie period prior to his termination, Plaintiff's hourly rate of pay increased to $12.00.

Plaintiff alleges that during his employment he

had problems with Barry Hardee. Prior to 1994, the plaintiff and Hardee worked I the same department, but Hardee was not his supervisor. Plaintiff alleges that in 1993 he was approached by Hardee, shown a list, and informed that plaintiff would be transferred to Hardee's area. Instead of accepting the transfer, the plaintiff took a voluntary layoff.

In December 1994 the plaintiff returned to work with Superior under the supervision of Charles Larrimore. Plaintiff alleges that he was occasionally sent to Hardee's shop to work there and that during each occasion, plaintiff was harassed by Hardee.

On May 11, 1998, plaintiff received a warning for not working required hours. The Plaintiff informed the defendant that the only time he was not working was where there was no work or when he had doctor's excuses. Plaintiff received a second warning on October 8, 199. Plaintiff had to take his wife who had cancer to the doctor. The plaintiff was terminated from his employment in October 1998 due to attendance problems.

Plaintiff went to work with Techno Steel. He was terminated fro his employment with Techno Steel for attendance problems.

In the summer of 1999 plaintiff attempted to return to employment with defendant, but was told that he would have to seek employment through a temporary agency. The plaintiff returned to work at Superior, through Spherion as a temporary employee. Plaintiff remained a temporary employee through his termination.

In December 2001, plaintiff was working on a weld and was told to assist Randy Riner, a permanent employee of the defendant, with a bucket weld. A disputed issue of fact exists as to whether or not

David Surrell, plaintiff's supervisor, told Plaintiff how to weld the bucket. Plaintiff alleges that he did not. Plaintiff testified that he observed Riner welding and proceeded to perform the same type of weld. Surrell approached plaintiff and yelled and cursed at him for performing the wrong weld. On December 28, 2001, the plaintiff was suspended for three days for not following work instructions and poor work quality. On January 2, 2002, Barry Hardee, Johnny Ham, and David Surrell "called [him] upstairs and told [him] that they didn't need [him]." (Plaintiff's Dep. At p. 67) They told him that they didn't need hi anymore because of lack of work and poor job performance.

Plaintiff testified that when he returned to work from his suspension he was told by another supervisor that Hardee did not like the Plaintiff. He testified that he regularly reported Hardee's racist behavior to management. Plaintiff also testified that Hardee, on several occasions made the statement "you ain't learn how to weld yet, boy." He also testified that Hardee was promoted the week prior to the termination of plaintiff's employment.

Plaintiff claims violation of 42 U.S.C. 1981a. Plaintiff states that the pattern of discrimination is clear in that he was performing at the expected level of his employer. Plaintiff further states that his termination occurred under such circumstances that an inference of racial discrimination can be made. Plaintiff also asserts that he and Randy Riner, a white employee, were involved in a weld and the plaintiff was terminated for making the wrong weld and Riner was not even disciplined.

Defendant filed its motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P. arguing that there is no genuine issue of material fact and that

it is entitled to judgment as a matter of law.

Legal Standard for Summary Judgment

Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ.P. 56(c). The moving party has the burden of proving that judgment on the pleading is appropriate. Once the moving party makes the showing, however, the opposing party must respond to the motion with "specific facts showing there is a genuine issue for trial." Fed.R Civ. P. 56(e).

When no genuine issue of any material fact exists, summary judgment is appropriate. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. Id. However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Id. (Quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

In this case, defendant "bears the initial burden of point to the absence of a genuine issue of material fact." Temkin v. Fredrick County Commrs, 845 F.2d 716, 718 (4th Cir. 1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). If defendant caries this burden, "the burden then shifts to the non-moving party to come forward with fact sufficient to create a triable issue of fact." Id. At 718-19 (citing Anderson,

477 U.S. at 247-48).

Moreover, "once the moving party has bet its burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial" Baber v. Hosp. Corp. of Am. 977 F.2d 872, 874-75 (4th Cir. 1992) he nonmoving party may not rely on beliefs, conjecture, speculation, of conclusory allegations to defeat a motion for summary judgment. Id. And Doyle v. Sentry, Inc., 877 F.Supp. 1002, 1005 (E.D.Va. 1995). Rather, the nonmoving party is required to submit evidence of specific facts by way of affidavits (see Fed.R.Civ.P. 56(e)), depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. Baber, 977 F.2d 872, citing Celotex Corp. supra. Moreover, the nonmovant's proof must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993); Deleon v. St. Joseph Hosp., Inc, 871 F.2d 1229, 1223 n. 7(4th Cir. 1989). Unsupported hearsay evidence is insufficient to *overcome a motion for Summary judgment*. Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 57 (5th Cir. 1987); Evans v. Techs. Applications & Servs. Co., 875 F.Supp. 1115 (D.Md.1995).

Racial Discrimination

The Parties agree that the proper analysis of this racial discrimination claim is under the McDonnell Douglas burden shifting test. Under that analysis, the plaintiff has the initial burden of demonstrating a prima facie case of discrimination. (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was

satisfactory; (3) he has suffered an adverse employment action; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances. Bryant v. Bell A. Maryland, Inc., 288 F.3d 124, 133 (4th Cir. 2002).

Once a prima facie case is established by the Plaintiff, the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for the plaintiff's termination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Once the Defendant has met this burden of production, the sole remaining issue is "discrimination vel non." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citing Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983)). In other words, the burden shifts ck to the Plaintiff to demonstrate by a preponderance of the evidence that the legitimate reason produced by the defendant is merely a perpetual reason for intentional discrimination. Reeves, 530 U.S. at 143, Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004).

Prima Facie Case

The defendant challenges that the Plaintiff can establish a prima facie case only as to the second and fourth elements required. There is no dispute among the parties that Plaintiff is a member of a protected class and that he has suffered an adverse employment action.

Defendant argues that plaintiff cannot prove that he as qualified for his job and that his job performance was satisfactory. The plaintiff argues that this element is established because the plaintiff had not been disciplined since returning to work and that he performed the weld just as Randy Riner had

performed the weld. Since this is a summary judgment motion the facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Shealy v. Winston, 929 F.2d 1009, 1011 (4th. Cir. 1991). For the purposes of this motion the court will assume that plaintiff has satisfied this element of the prima facie case.

Defendant argues that plaintiff cannot establish that other employees who were not members of the protected class were retained under apparently similar circumstances. Plaintiff alleges that Riner, a white employee, was a similarly situated employee who performed the bucket weld the same way as plaintiff and there he was not disciplined. The defendant asserts that Riner was not similarly situated in that he was a full-time, permanent Superior employee while plaintiff was a temporary employee. In order to establish that other employees to be similarly situated, they must be similarly situated in all relevant respects: that they "dealt with the same supervisor, [were] subject to the same standards and...engaged in the same conduct without such mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Mitchell v. Toledo Hosp., 864 F.2d 577, 583 (6th Cir. 1992) (citing Mazzella v. RCA Global Commun., In., 642 F.Supp. 1531 (S.D.N.Y. 1986). Plaintiff states that he was not told how to correctly perform the weld and that he and Riner both performed the same welds. On the record before the court, the court is unable to determine whether or not this information is true, but will assume that it is true for the purposes of this motion. The court believes that they are not similarly situated because Riner was a full-time, permanent employee while plaintiff was a temporary employee;

however, the parties have not provided, and there court has not found, any law to support the proposition that a temporary employee and a full-time, permanent employee are or are not similarly situated. Nevertheless, there court finds hat plaintiff has failed to establish that defendant's reason for terminating him is pretextual.

Legitimate, Nondiscriminatory Reason for Termination

Assuming for the sake of argument, that the plaintiff has established a prima facie case of discrimination based on race, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for his termination. O'Connor v. Consol. Caterers Corp., 517 U.S. 308, 311 (1996). In the instant case, the defendant has articulated its reason or termination of the plaintiff. In the face of business slowdown, the company's management determined that it would phase out temporary employees whenever possible rather than terminating permanent employees. Affidavits submitted by defendant indicates that due to an economic slowdown in 1999 its workforce decreased from 230 to 143.

Discrimination Vel Non

Since the defendant has articulated a legitimate, nondiscriminatory reason for terminating the plaintiff's employment, the burden shifts to the plaintiff to show that the reason articulated is false and merely pretext for intentional discrimination. Reeves, 530 U.S. 133; Hill, 354 F.3d at 285. In satisfying this burden, it is the perception of the employer that is critical. Hawkins v. Pepsico, 203 F.3d 274, 279 (4th Cir. 2000). The Plaintiff has failed to offer any evidence contrary to the reason that the defendant terminated plaintiff due to the downsizing

of its temporary work force.2 Additionally the plaintiff does not dispute that he performed the weld incorrectly. He only alleges that Riner performed the weld incorrectly as well. Thus, plaintiff has failed to show that defendant's articulated reason is false and pretextual. 3 Even if viewed in a light most favorable to the Plaintiff, no reasonable jury could determine that racial discrimination was the reason for defendant's actions because the plaintiff has failed to provide evidence that racial discrimination was the reason for defendant's actions. At best, the plaintiff has established that Hardee, who was not a supervisor of the Plaintiff, had a racial bias against the plaintiff.

Retaliation Claim

The parties agree that the retaliation claim is properly analyzed under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) Under this framework, a plaintiff must set forth a prima facie case of intentional discrimination. To establish a prima facie case for retaliation, a plaintiff must show (1) that he engaged in a protected activity, (2) defendant took adverse employment action against him, and (3) a causal connection existed between the protected activity in the adverse action. Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 271 (4th Cir. 2001); Ross v. Commun. Satellite Group, 759 F.2d 355, 365 (4th Cir. 1985). As with the above claim,

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2 The Court notes that plaintiff states in his objections: "The [Magistrate Judge] relied on affidavits submitted with the Defendant's motion for summary judgment. However, in the depositions of individuals still employed with the Defendant they testified that the Defendant continued to hire and promote temporary employees." (Objections p. 7-8). However, while this

blanket allegation is made, there is no reference made to specific portions of depositions to support this allegation.

3 The court notes that in William v. Grimes Aerospace Co., 988 F.Supp. 925, 940 (D.S.C. 1997), the Honorable Henry M. Herlong, Jr., held that a company's policy of promoting full-time over temporary employees was not a pretext for discrimination. This court likewise finds that the termination of a temporary over a full-time employee in an effort to decease the size of its workforce was not a pretext for discrimination.

Once the plaintiff has established a prima facie case the burden shifts to he defendant to produce a legitimate, *nondiscriminatory reason for* the termination. Texas Dept. of Community Affairs, 450 U.S. at 254. Once the defendant has satisfied that burden, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that there reasons stated by the defendant were not its true reasons, but were pretext for discrimination. Reeves, 530 U.S. at 143.

Prima Facie Case

There is no dispute between the parties that termination qualifies as an adverse employment action for the purposes of Title VII.

Plaintiff asserts that he engaged in a protected activity when he complained of racial discrimination by Hardee to Vaughn Williams and his supervisor. Williams attests that periodically the plaintiff would commend that he believed he was being denied seniority or pay increases because of discrimination, but that he could not define any justification for these claims. Williams further attests that he is the one who made the decision to terminate the plaintiff.

A plaintiff must show that he opposed an

unlawful employment practice which he reasonably believed had occurred or was occurring. Biggie v. Albertsons, Inc., 849 F.2d 1497, 1503 (11th Cir. 1990). "The inquiry is therefore (1) whether [plaintiff] 'subjectively (that is, in good faith) believed' that the district had engaged in a [illegal practice], and (2) whether this believe 'was objectively reasonable in light of the facts,' a standard which we will refer to as one of 'reasonable belief.'" Peters v. Jenney, 327 F.3d 307 (4th Cir. 2003) (citing Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002). Viewed in the light most favorable to the plaintiff, based on Williams deposition testimony, the plaintiff engaged in a protected activity.

A lack of temporal proximity can negate an inference of causation. Clark County Sch. Dist. V. Breeden, 532 U S. 268, 273-74 (2001); Causey v. Blalog, 162 F.3d 795, 803 (4th Cir. 1998; Dowe v. Total Action Against Poverty, 145 F.3d 653, 657 (4th Cir. 1998). In the instant case the plaintiff has failed to identify specific facts to establish a causal connection. The defendant has presented evidenced showing a separation of approximately ten (10) years between the time of the protected activity and the adverse action. Plaintiff has failed to identify evidence to challenge this evidence presented by Defendant and , therefore has failed to carry has burden o establish a prima facie case for retaliation.

Legitimate, Nondiscriminatory Reason for Termination and Discrimination Vel Non

As discussed more fully above and in the Report, the defendant has articulated a reason for terminating the employee and the plaintiff has failed to establish that the reason is false and pretextual.

State Law Claims

Under 28 U.S.C. 1447 this court is required to remand an action to state court "[I]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Thus, having determined that the defendant is entitled to summary judgment on the plaintiff's federal claims, it is now improper for this court to address the remaining state law claims and they should, therefore, be remanded to the Court of Common Pleas of Florence County, South Carolina for further proceedings.

Conclusion

I find as a matter of law that there are no issues of material fact and defendant is entitled to summary judgment as to plaintiff's claims based on 42 U.S.C. 1981a.

For the foregoing reasons, the undersigned adopts and incorporates the Report and Recommendation of the Magistrate Judge and GRANTS the defendant's motion for summary judgment as to all federal causes of action and the remaining state law claims are REMANDED to the Court of Common Pleas of Florence County, South Carolina for further proceedings.
AND IT IS SO ORDERED.

R. Bryan Harwell
United States District Court Judge

November 15, 2004
Florence, South Carolina

2. Unpublished 4th Circuit Opinion, Dec. 16, 2005

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1043

JOSHUA SAMUEL,

Plaintiff – Appellant

Versus

SUPERIOR MACHINE COMPANY OF SOUTH CAROLINA, INCORPORATED

Defendant – Appellee

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, *District Judge*. *(CA-02-1971-4-27)*

Submitted: November 28, 2005

Decided: December 16, 2005

Before NIEMEYER, MICHAEL, and DUNCAN, Circuit Judge

Affirmed by unpublished per curiam opinion.

Chalmers C. Johnson, CHALMERS JOHNSON LAW FIRM, Charleston, South Carolina, for Appellant. Mark W. Buyck, III, WILLCOX, BUYCK & WILLIAMS, P.A., Florence, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Joshua Samuel appeals the district Court's order accepting the recommendation of the magistrate judge and dismissing his civil action alleging employment discrimination under 42 U.S.C. 1981 (2000). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Samuel v. Superior Machine Co., No. CA-02-1971-4-27 (D.S.C. filed Nov. 16, 2004 &

entered Nov. 18, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

3. Report and Recommendation of August 16, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

JOSHUA SAMUEL,	)CIVIL ACTION NO.
	)4:02-1971-27B11
Plaintiff,	)
	)
Vs.	) REPORT AND
	)RECOMMENDATION
SUPERIOR	)
MACHINE	)
COMPANY OF	)
SOUTH CAROLINA,	)
INC.,	)
	)
Defendant.	)
	)

Plaintiff commenced this action by complaint filed April 18, 2002, in the Court of Common Pleas, Florence County, South Carolina, alleging causes of action for discipline and race discrimination in violation of 42 U.S.C. 1981a, retaliation in violation of 42 U.S.C. 1981a, and breach of contract based on an employment handbook. The defendant removed the action to this court on June 7, 2002 and filed its answer. Defendant files its motion for summary judgment with accompanying supporting memorandum on September 24, 2003, to which plaintiff filed an opposing memorandum on October

10, 2003. Defendant's motion (Doc # 13) is now before the court for disposition.

FACTS

Defendant is located in Florence, South Carolina and its principal line of business is the repair and fabrication of heavy industrial machinery. Defendant states that it now employs approximately 143 persons in its Florence facility and the majority of its employees are classified as welders, riggers, or fitters. Defendant employs both permanent and temporary employees. All employees are hired through the temporary agency and some are later offered permanent employment.

Plaintiff, an African American, was first hired by defendant in 1986 as a welder after taking a welding test, and was employed periodically by Defendant until his termination in December 2001. When first hired he was paid $6.00 per hour. Over the time period through 2001, his hourly rate of pay increased to $12.00.

Plaintiff asserts that he had problems with Barry Hardee during his employment with defendant. Prior to 1994, plaintiff worked in the same department as Hardee, but Hardee was not his supervisor. In 1993, plaintiff alleges he was approached by Hardee and informed that plaintiff would be transferred to Hardee's area. Instead of accepting the transfer, plaintiff took a voluntary layoff.

In December of 1994, plaintiff returned to work with defendant under the supervision of Charles Larrimore. Plaintiff was occasionally sent to Hardee's area to work and, he alleges, he was harassed by Hardee on each occasion. Plaintiff testified that on one occasion, Hardee showed him a handful of change and told him it was some of his "Klan money." Plaintiff informed George Turner of this incident, and was told

Hardee did not like African-Americans.

On May 11, 1998, plaintiff received a warning for not working required hours. Plaintiff informed defendant that the only time he as out was when there was no work and when he had medical excuses. He was told medical excuses did not mean anything to Defendant. Plaintiff received a second warning on October 8 1998. He was absent fro work but stated his wife had cancer and he had to take her to the doctor. He was terminated fro his employment in 1998 due to attendance problems. Plaintiff then went to work with Techno Steel. He was terminated from his employment when Techno Steel for attendance problems.

Plaintiff returned to work with defendant in the summer of 1999 as a temporary employee through Spherion, a temporary agency. Plaintiff remained a temporary employee until his termination in December 2001, except during a six week break between June 4, 2001 and July 16, 2001 when Plaintiff quit because he needed a job with insurance.

When plaintiff returned to work with defendant in 1999, his supervisor was Charles Larrimore. Plaintiff testified that Larrimore told him that he would not be sent home because he was too valuable of an employee for the company to waste time.

In December 2001, plaintiff was working on another weld and was told to assist Randy Riner, a permanent employee of defendant, with a bucket weld. A disputed issue of fact exists as to whether or not David Surell plaintiff's supervisor, told plaintiff how to weld the bucket. In any event, plaintiff testified that he observed Riner welding and proceeded to perform the same type of weld. David Surrell approached plaintiff and yelled and cursed him for performing the wrong weld. On December 28, 2001, Surrell suspended

plaintiff for three days for not following work instructions and poor work quality. On January 2, 2002, Barry Hardee, Johnny Ham, and David Surrell "called [him] upstairs and told [him] upstairs and told [him] that they didn't need [him]." (Plaintiff's Depo. At 67) They told him that did not need him because lack of work and poor job performance. (Plaintiff's Depo. At 65)

Plaintiff testified that when he returned from his suspension he was told by another

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1 Both parties admit that plaintiff attempted to return to employment with defendant but was advised that he had to seek employment through a temporary employment agency.

Supervisor that Hardee did not like the Plaintiff. He testified that he regularly reported Hardee's racist behavior to management including but not limited to James Odom, Von Willaims, and Mr. Jackson. Plaintiff also testified that Hardee on several occasions, made the statement "you ain't learn how to weld yet, boy." He also testified that Hardee was the week prior to the termination of the Plaintiff's employment.

SUMMARY JUDGMENT

Plaintiff filed claims against defendant in violation of 42 U.S.C. 1981a. In summary, plaintiff states that the pattern of discrimination is clear in that he was performing at the expected level of his employer because prior to his termination he had been told that he was one of the most valuable employees of defendant. Further, plaintiff states that his termination occurred under such circumstances that an inference of race discrimination arose. Plaintiff asserts that he and Randy Riner, a white employee, were involved in a

weld and the plaintiff was terminated for making the wrong weld and Riner was not even disciplined.

Defendant filed its motion pursuant to Rule 56, Fed.R.Civ.P. Because Defendant is the moving party, it bears the burden of showing that summary judgment is proper. Summary Judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, FRCP, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is people if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. Celotex, 477 U.S. 317. Once the moving party has brought into question whether three is a genuine issue for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine issue for trial. Fed. R. Civ. P. 56(e); Matsushita Electrical Industrial Co. Ltd v. Zenith Radio Corp., 475 U.S. 574 (1986) The non-moving party must come forward with enough evidence beyond a mere scintilla upon which the fact finder could reasonably find for it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for Summary Judgment. Barber v. Hosp. Corp. of Am., 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mtichell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993).

ANALYSIS

Disparate Treatment

Section 1981

42 U.S.C. 1981 provides, in pertinent pat as follows:

A) all persons within the jurisdiction of the United States shall have the same right in every Sate and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of parsons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other, b) For purposes of this section, the term "make and enforce contract" includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

The parties agree that the proper analysis of his disparate treatment claim is under the McDonnell Douglas burden shifting test. Under that analysis, plaintiff has the initial burden of demonstrating a prima facie case of discrimination. TO establish a prima facie case, plaintiff must show (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he suffered an adverse employment action; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances. Bryant v. Bell Atlantic Maryland, Inc., 288 F.3d 124, 133 (4th Cir. 2002). The fourth element can be established by presenting evidence raising an inference of discrimination. Once Plaintiff has established a prima facie case, the burden shifts to the

defendant to produce a legitimate, nondiscriminatory reason for the termination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). This is merely a burden of production, not one of persuasion. St Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). Once the defendant has met its burden of production by producing its legitimate, nondiscriminatory reason, the sole remaining issue is "discrimination vel non." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000)(citing Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983)). In other words, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the legitimate reason produced by the defendant is not its true reasons but merely pretext for intentional discrimination. Reeves, 530 U.S. at 143; Hill v. Lockheed martin Logistics Mgmt, Inc. 354 F.3d 277, 285 (4th Cir. 2004). During all of the burden shifting scheme set forth in McDonald Douglas, the ultimate burden of proving that defendant intentionally discriminated against the Plaintiff.

There is no dispute as to the first (plaintiff is a member of a protected class) and third (plaintiff suffered an adverse employment action) prima facie elements. Defendant challenges

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2 The required elements of a prima facie case of employment discrimination are the same under Title VII and 1981. Gairola v. Commonwealth of Va. Dept. of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir. 1985).

Plaintiff's proof as to the second (he was qualified for his job and his job performance was satisfactory) and fourth (the other employees who are not members of the protected class were retained under apparently

similar circumstances) elements.

Defendant argues tat plaintiff cannot prove the second prima facie element because he cannot establish that his job performance was satisfactory. Defendant asserts that Mr. Surell made the decision to suspend plaintiff which was based on his assessment that plaintiff had disobeyed a direct instruction regarding the type of weld to utilize in a project. The warning was "not following work instructions and poor work quality." Secondly defendant argues that plaintiff cannot rely on his contention that Mr. Riner as a similar situated employee in that Riner was a full-tie Superior employee while plaintiff was a temporary employee of Spherion. Further, defendant argues that the undisputed evidence in the case is that at the time of plaintiff's termination, he was a temporary employee and defendant was in the process of downsizing its temporary workers. Thus, defendant argues hat plaintiff is not a proper comparator of defendant's disparate treatment claim Therefore, defendant argues that not only was Plaintiff's job performance not satisfactory, he cannot show that another employee, not a member of the protected class, was retained under similar circumstances.

Others Similarly Situated

Plaintiff alleges that there was one white employee, Riner, who was similarly situated, who was welding a bucket the same way plaintiff as welding, and was not disciplined while plaintiff was suspended. Defendant asserts that Mr. Riner was not a similar situated employee in that he was a full-time Superior employee while plaintiff was a temporary employee and defendant was in the process of downsizing.

Plaintiff must establish that "other employees" were similarly situated in all relevant respects; that they dealt with the same supervisor, [were] subject to

the same legal standard and he engaged in the same conduct without such mitigating circumstances that would distinguish their conduct of the employer's treatment of them for it." Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) (citing Mazzella v. RCA Global Communications, Inc., 642 F.Supp. 1531 (S.D.N.Y. 1986) aff'd, 814 F.2d 653 (2d Cir. 1987); Lanear v. Safeway Grocery, 843 F.2d 298 (8th Cir. 1988)(Plaintiff must prove that he and the white employee were similarly situated in all respects and that the other employee's acts were of comparable seriousness to his own); Cox v. Electronic Data Systems Corp., 751 F.Supp. 680(E.D. Mich. 1990)); Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617-18 (7th Cir. 2000)(holding that plaintiff must demonstrate that the same supervisor was involved in comparable situations to demonstrate disparate treatment of similarly situated employees.) Stan back v. Best Diversified Products, Inc., 180 F.3d 903, 910 (8th Cir. 1999)(same); Shimway v. United Parcel Services Inc., 188 F.3d 60, 64 (2d Cir. 1997)(employees were not similarly situated because they were not supervised by the same person.); See Heyward v. Monroe, 1998WL 814494 (4th Cir. 1998)(Unpublished) and Edwards v. Newport News Shipbuilding and Dry Dock Co., 1998 WL 841567 (4th Cir. 1998)(Unpublished)(citing Mitchell v. Toledo Hosp.); Cf Cook v. CSX Transp. Co., 988 F.2d 507, 511 (4th Cir. 1993)(no comparators will involve precisely the same circumstances.)

Neither party cites any authority for their arguments regarding whether or not Riner and plaintiff were similarly situated. Plaintiff argues that plaintiff and Riner both performed the same weld and plaintiff was suspended and Riner was not disciplined at all. Defendant argues that Riner and Plaintiff were not similarly situated because plaintiff as a temporary

employee and Riner was a full-tie employee and defendant was it eh process of downsizing its temporary workers. Plaintiff asserts that there is an issue of fact as to whether Riner and plaintiff committed the same acts. However that does not consume our inquiry. The inquiry is whether or not Riner and plaintiff were similarly situated, one consideration of which is whether they committed the same acts. Clearly, Riner was dissimilar I that he was a full time employee while plaintiff was temporary. Additional, it is undisputed that defendant was downsizing its temporary workforce. Plaintiff states that he was not told how to correctly perform the weld. It is undisclosed in the parties' briefs whether this is true for Riner. It is the plaintiff burden to come forth with specific facts showing a genuine issue for trial. Plaintiff has failed to show Riner was a similarly situated comparator for purposes of Title VII.

Defendant also contends that plaintiff was not performing satisfactorily. Plaintiff does not dispute that he performed the weld incorrectly and that he was suspended by Surell for not following work instructions and poor quality. Accordingly, plaintiff has failed to establish the second and fourth elements of his prima facie case and, therefore, defendant's motion for summary judgment should be granted.

Assuming, arguendo, that plaintiff has established a prima facie case of discrimination based on race, defendant has articulated its legitimate, nondiscriminatory reason for terminating plaintiff's employment: in the face of business slowdown the company's management determined that it would phase out temporary employees whenever possible rather than terminating permanent employees. See O'Connor v. Consolidated Coun Caterers Corp., 517 U.S. 308, 311 (1996)(once plaintiff establishes a prima

facie case, defendant has the burden of production to articulate a legitimate nondiscriminatory reason.) Therefore, plaintiff caries the burden of showing defendant's articulated reason is false and merely pretext for intentional discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); Hill, 354 F.3d 285.

Plaintiff has the ultimate burden of presenting evidence from which a reasonable jury could conclude defendant intentionally discriminated against hi based on his race. It is not necessary to decide "whether the reason was wise, fair, or even correct, ultimately, so long as it truly as the reason for the plaintiff's termination." Hawkins v. PepsiCo, 203 F.3d 274, 279 (4th Cir. 2000)(quoting and citing DeJarnette v. Corning, Inc., 133 F.3d 293, 299(4th Cir. 1998); DeJarnette, 133 F.3d at 299([T]his court does not sit as a kind of super personnel department weighing the prudence of employment decisions, made by firms charged with employment discrimination...." (internal quotation marks omitted)); Henson v. Liggett Group, Inc., 61 F.3d 270, 277 (4th Cir. 1995)("We have recognized the importance of giving and employer the latitude and autonomy to make business decisions, including workplace reorganization as long as the employer does not violate the ADEA."); Jimine v. Mary Washington College; 57 F.3d 369, 377 (4th Cir. 1995)("Title VII is to a vehicle for substituting the judgment of a curt for that f an employer.") It is the perception of the employer t is critical. Hawkins, 203 F.3d at 280.

Plaintiff may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Barber at 874-75(4th Cir. 1992). He has failed to make a showing sufficient to defeat defendant's motion for summary judgment.

He has failed to establish a prima facie case of discrimination under Title VII and , assuming arguendo that he has he has failed to show that defendant's articulated legitimate, nondiscriminatory reason is false and pretextual. Defendant provided affidavits from Vicky Carter, Human Resource Manager at Superior Machine Company of South Carolina and Vaughn Williams, former Vice President of Manufacturing at Superior Machine Comment from 1996 through July 2003. On September 24, 2003, Vicky "Carter" submitted her affidavit in which she attests that defendant's business is cyclical and unpredictable.

In 1998, Carter states that defendant worked 230 individuals at any one time which were a combination of permanent and temporary employees. Carter attests that in order to arrange the staffing needs, defendant established a policy of only hiring permanent employees after they had worked on site as a temporary employee. Carter states that this practice was in place in 1999 when plaintiff was brought onsite as a Spherion temporary employee. Carter attests that subsequent to 1999 defendant experienced a downturn in orders which has had a corresponding decrease in defendant's staffing needs. Carter states that defendant was impacted significantly during an economic slowdown which began in 1999 and that the overall size of the workforce decreased from 230 in 1998 to the current 143 persons. Carter attests that in October 2000, defendant enacted across the board cost cutting measures, one of which involved eliminating temporary employment obligations, mainly through attrition. Carter attests that this policy was in effect in January 2002 when defendant requested that Spherion no longer send plaintiff to its work site. Further Carter attests that defendant has not engaged any new welders

since January 2001 with the exception of nine individuals hired in August 2002, to complete a special project. Carter attests that eight f these nine individuals worked on Defendant's site for less than two months while the ninth was hired as a permanent employee but subsequently terminated for violation of company policy.. Lastly, Carter attests that all of the 143 employees of defendant are permanent employees and that defendant has successfully eliminated their need to temporary employees.

Vaughn Williams ("Williams") attests that I 1998, the onsite staffing peaked at approximately 230 individuals but when he left Superior in July 2003, - three were fewer than 150 employees. Williams attests that a policy was established in 1999 of only hiring permanent welders after they had worked on side as a temporary employee which were contracted through a temporary employment agency. Williams states that defendant contracted directly with the agency and did not contract with the temporary employees and all payments were made through the temporary agency. Williams attests that subsequent to 1999, defendant experienced a downturn in orders and business which had a corresponding decrease in staffing needs. Defendant was constantly attempting to manage cash flow and one of the most significant line items was the contract with the temporary agency. Therefore, Williams attests that in the fall of 2000 defendant enacted a cost cutting measure which involved eliminating temporary employment obligations whenever possible, mainly through attrition. Williams attests that there were no temporary welders engaged in services at the time of his departure. Williams attests that he is personally familiar with plaintiff who approached Williams a number of times during his various periods of working on site. Williams attests

that plaintiff claimed he had been treated unfairly for an incident hat occurred several years prior Williams' arrival. Williams attests that he could never understand that details of that specific incident, though plaintiff claimed it cost him seniority at the plant. Williams states that periodically, plaintiff would comment that he believed he was being denied seniority or pay increases because of race discrimination; however, Williams attests that he could never determine any justification for these claims.

Williams attests that plaintiff never complained to h regarding any ongoing race discrimination but never provided any specific instances of discrimination or any specific complaints. Williams attests that invariably he would conclude these observations by pointing out to plaintiff that approximately half of Defendant's employees were black. Williams attests that on or about December 28, 2001, he became aware that David Surrell, who at that time had been plaintiff's supervisor for approximately one month, had suspended Plaintiff for poor job performance. Williams attests that Mr. Surrell informed him that plaintiff had incorrectly performed a welding project contrary to Mr. Surrell's specific instructions. Williams attests that after reviewing the matter with Mr. Surrell and examining defendant's staffing needs. He made the decision to eliminate this temporary pistons for cost cutting purposes. Williams attests that Plaintiff's race was irrelevant to his decision, and the fact that he had previously made non-specific references to race discrimination was not a consideration. Williams attests that this position was not subsequently filled and the defendant continued to eliminate temporary employment arrangements whenever possible. Williams attest that at the time of his departure, there were no temporary employees on

site.

Plaintiff has not offered any evidence or argument to the contrary that the defendant eliminated its temporary employees due to downsizing. See Olsen v. Marshall & Ilsley Corporation 267 F.3d 597, 601 (7th Cir. 2001) (plaintiff must show each of defendant's reasons are pretextual to withstand summary judgment); See also Chapman v. A.L. Transport, et al., 229 F.3d 1012, 1037 (11th Cir. 2000)(stating in dicta that plaintiff must produce sufficient evidence to refute each of the employer's preferred reasons). Additionally, although plaintiff testified that he was not told how to perform the weld, he does not dispute he performed it incorrectly. Also, he claims that Hardee harbored racial animus towards him which he does not dispute that Surrell is the supervisor that cursed him and suspended him for incorrectly performing the weld.3 Thus, plaintiff has failed to show that defendant's articulated legitimate, nondiscriminatory reason is false and pretextual. Even in the light most favorable to the plaintiff, no reasonable jury could determine that racial

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3 The parties do not address who is a supervisor for the purposes of plaintiff's claim. See Hill v. Lockheed Martin Logistics Mgmt, Inc., 354 F.3d 277 (4th Cir. 2004).

Discrimination was the reason for the Defendant's actions.

Retaliation Claim

The parties agree that this case is properly analyzed under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under McDonnell Douglas, plaintiff must first set forth a

prima facie case for retaliation under Title VII, Plaintiff must show (1) he engaged in a protected activity (2) defendant took adverse employment action against him, and (3) a causal connection existed between the protected activity and the adverse action. Matvia v. Bald Head Island Management, Inc., 259 F.3d 261, 271 (4th Cir. 2001); Ross Communications Satellite Corp. 759 F.2d 355, 365 (4th Cir. 1985). Once plaintiff has established a prima facie case, the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for the termination. Texas Dept. of County Affairs f. Burdine, 450 U.S. 248, 254 (1981). This is merely a burden of production, not of persuasion. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). Once the defendant has med its burden of production by producing its legitimate, nondiscriminatory reason, the sole remaining issue is "discrimination vel non." Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, 143 (2000)(citing Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983)). In other words, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the legitimate reasons produced by the defendant were not its true reasons, but were pretext for discrimination. Reeves, 530 U.S. at 143. During all of the burden shifting scheme set forth in McDonald Douglas, the ultimate burden of proving that defendant intentionally discriminated against the plaintiff remains at all ties with the plaintiff.

Protected Activity

Plaintiff asserts that he engaged in protected activity with he complained of racial discrimination by Hardee to Vaughn Williams and his supervisor. Plaintiff contends that several incidents occurred where the plaintiff was subjected to negative and racially charged

comments by Mr. Hardee. Plaintiff alleges that not long after complaining of Mr. Hardee's actions, Mr. Hardee was promoted and the plaintiff became even more subjected to harassment. Plaintiff argues that he reported the problem to his supervisor but nothing was done by management as to Hardee's comments.

As stated above, Williams attests that periodically, plaintiff would commend that he believed he was being denied seniority or pay increases because of race discrimination; however, Williams attests that he could never determine any justification for these claims. Williams also attests that he was the one who made the decision to terminate the Plaintiff.

To establish "protected activity" plaintiff must show that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring. Bigge v. Albertsons, Inc., 894 F.2d 1497, 1503 (11th Cir. 1990); see also Ross, 759 F.2d at 355n. 1 (stating that a Title VII oppositional retaliation claimant need not shoe that the underlying claim of discrimination was in fact meritorious in order to prevail). "the inquiry is therefore (1) whether [plaintiff] "subjectively (that is, in good faith) believed" that the district had engaged in a [illegal practice], and (2) whether this belief 'was objectively reasonable in light of the facts,' a standard which we will refer to as one of 'reasonable belief.'" Peters v. Jenney, 327 F.3d 307 (4th Cir. 2003) (Citing Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002)).

In the light most favorable to the plaintiff since Williams testified in his deposition that plaintiff had complained to him periodically or made comments about racial discrimination in the past, the undersigned finds that plaintiff engaged in protected activity. As to an adverse employment action, there is no dispute that

termination qualifies for purposes of Title VII as an adverse action.

As to causal connection, defendant argues that plaintiff has failed to establish a temporal proximity between hi alleged protected activity and defendant's alleged discrimination conduct. It cites Clark County Sch. Dist. V. Breeden, 532 U.S. 268, 273-74 (20010, which clearly establishes that a lack of temporal proximity can negate an inference of causation. The Fourth Circuit has recognized this as well. See Causey v. Balog, 162 F.3d, 803 (4th Cir. 1988); Dowe v. Total Action Against Poverty, 145 F.3d 653, 657 (4th Cir. 1998). Defendant has set forth a chronological description of the alleged complaints of plaintiff relating to race. Plaintiff has failed to identify specific facts refuting defendant's factual claims. Defendant presents evidence showing a time separation of approximately ten years between the time of the alleged protected activity and the adverse action. Plaintiff has failed to identify evidence challenging that identified by the Defendant. Any protected activity happened at least prior to his last employment period with defendant and is too remote to find a causal connection for retaliation. 4

Assuming Arguendo, plaintiff has established a prima facie case, the defendant has the burden of articulating a legitimate, nondiscriminatory reason for taking adverse action against plaintiff. For the same reasons discussed above, plaintiff has failed to create a material issue of fact regarding the defendant's articulated nondiscriminatory reasons for terminating plaintiff's employment.

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4 As defendant sets forth, plaintiff resigned on more than one occasion and was rehired on more than one occasion, albeit the third time as a temporary

employee.

STATE LAW CLAIMS

Plaintiff also asserts claims for breach of contract. This case was removed by the defendant from the Court of Common Pleas, Florence County, South Carolina. The Court is required to remand an action to state Court "[i]f at any time before trial final judgment it appears that the district judge agrees that the plaintiff's federal claims should be dismissed, the court should remand the remaining state law claims to the Court of Common Pleas for Florence County, South Carolina for further proceedings.

For the foregoing reasons, it is recommended that defendant's motion for summary judgment (Doc. #13) be granted regarding plaintiff's claims under Title VII and the remaining state law claims to be remanded for further proceedings.

Respectfully Submitted,

Thomas E. Rogers, III
United States Magistrate Judge

August 16, 2004
Florence, South Carolina

(2)

FILED
MAY 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1187

IN THE

Supreme Court of the United States

JOSHUA SAMUEL,

Petitioner,

v.

SUPERIOR MACHINE COMPANY
OF SOUTH CAROLINA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

MARK W. BUYCK, III
E. LLOYD WILLCOX, II*
WILLCOX, BUYCK
& WILLIAMS, P.A.
P.O. Box 1909
Florence, SC 29503-1909
(843) 662-3258

* *Counsel of Record* *Attorneys for Respondent*

201259

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Superior Machine Company of South Carolina, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Defendant/Respondent Superior Machine Company of South Carolina, Inc. submits this Opposition Brief in Response to Petition for a Writ of Certiorari filed by Plaintiff/ Petitioner Joshua Samuel (Case Number 05-1187).

Petitioner asserts that the Court should review the decision in this matter because the District Court for the District of South Carolina erred when it did not analyze this pursuant to a mixed motive formula prior to granting summary judgment in favor of the Defendant/Respondent. Petitioner further contends evidence which the Petitioner claims as pretext as to the employer's stated reason for discharge should be considered prima facie proof of discriminatory intent on the employer's part.

Petitioner's claims fail on the merits, the law, and relies in part on a misstatement of the record.

STATEMENT

The record shows that Superior Machine Company of South Carolina, Inc. is in the business of repair and fabrication of heavy industrial machinery. Superior's onsite staffing at its Florence, South Carolina location peeked at 230 individuals in 1998. By September 2003, due to a decline in business, Superior's workforce was 143 individuals.

Joshua Samuel was an on-again, off-again employee of Superior for approximately 15 years. A welder by trade, he was first hired in 1986. On January 14, 1993 Mr. Samuel requested a voluntary layoff. He worked for several other companies until reapplying at Superior in December 11, 1994.

Mr. Samuel began having attendance problems in 1998 which he attributes to work missed while caring for his sick wife. Mr. Samuel left Superior's employment in October 1998 and accepted a welding job at Techno Steel at an identical rate of pay. Mr. Samuel's tenure at Techno Steel was short as his attendance difficulties continued with his new employer.

In 1999 Mr. Samuel attempted to reapply for employment at Superior. He was informed that Superior was not accepting applications for permanent positions. He was advised to apply for a position with a temporary employment agency, Spherion. In the summer of 1999 Mr. Samuel was again welding at Superior; however, he was directly employed by Spherion.

On June 4, 2001 Mr. Samuel notified Superior that he was quitting due to his frustration with not being hired as a full time employee. After a six week hiatus Mr. Samuel returned on July 16, 2001 as a welder, again as a temporary Spherion employee. On December 28, 2001, David Surrell, Samuel's on-site supervisor, suspended him for three days for "not following work instructions and poor work quality." On January 2, 2002 Mr. Samuel was informed that he was being laid-off due to lack of work.

Mr. Samuel's complaints of race discrimination center on his relationship with a supervisor at Superior, Mr. Barry Hardee. Although Mr. Samuel was never directly supervised by Mr. Hardee, Mr. Samuel claims that the two had frequent contact. Mr. Samuel's problems with Mr. Hardee started in 1986, the first year of his employment. At that time Mr. Hardee criticized Mr. Samuel's welding; however, his criticisms were not limited to Mr. Samuel. In January of 1993 Mr. Hardee informed Mr. Samuel that he was going to be

reassigned to Hardee's supervision. Mr. Samuel asserts that his voluntary layoff in January 1993 was a result of his belief that Mr. Hardee would become his supervisor. Only after returning to Superior's employment in December of 1994 did Mr. Samuel discover that Mr. Hardee's claim that he would be Mr. Samuel's supervisor was false and just a joke. Mr. Samuel felt duped and requested from Superior's management that he be credited for continuous service for the approximately two years he was working elsewhere. Mr. Samuel relates one specific event during which Mr. Hardee allegedly said, "Look, this is some of my Klan money." According to Mr. Samuel this event occurred prior to his January, 1993 termination.

Superior's business is cyclical and unpredictable. Mr. Samuel returned to Superior's site in the summer of 1999 pursuant to a contract Superior had with a temporary employment agency. From 1998 through 2003 Superior's staffing needs declined from 230 individuals to 143. This decrease in staffing occurred due to an overall downturn in Superior's business. In approximately the Fall of 2000, Superior adopted an overall cost-cutting plan. One element of the plan was the elimination of temporary employment obligations whenever possible, mainly through attrition. This policy was in effect in January of 2002 when Mr. Samuel was informed that his services were no longer needed.

The Plaintiff filed an action in the Court of Common Pleas, Florence County, South Carolina, alleging several causes of action under South Carolina law and disparate discipline and race discrimination in violation of 42 U.S.C. § 1981a. The Defendant/Respondent removed the case to the United State District Court, District of South Carolina.

REASONS FOR DENYING THE PETITION

I. The Petitioner Failed to Request a Mixed Motive Analysis of the Case while it was Pending Before the District Court.

The Petitioner contends that the lower court should have performed a mixed motive analysis at the summary judgment stage rather than the *McDonnell Douglas* shifting burden analysis. Without addressing the merits of this claim, the Petitioner utterly failed to present this argument to the lower court and has thereby failed to preserve the issue for appellate review.

In analyzing this case both the District Court and the Magistrate Judge applied *McDonnell Douglas*[1] to the facts in the record. The Defendant/Respondent, in its Motion for Summary Judgment, analyzed the case pursuant to *McDonnell Douglas*. In his objections to the Report and Recommendation, the Plaintiff again analyzed the case in accordance with *McDonnell Douglas*. Both the Report and Recommendation and the Order Granting Summary Judgment note that "the parties agree that the proper analysis of the disparate treatment claim is under the *McDonnell Douglas* burden shifting test." At no time during the pendency of the case at the trial court level did the Petitioner request a mixed motive analysis or suggest its applicability to the facts of this case.

Petitioner relies on *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) in support of his argument that the District Court was under an obligation to apply a mixed motive analysis,

1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

even though he never requested such an analysis. In *Keelan v. Majesco Software, Inc.*, 407 F.3d 332 (5th Cir. 2005) the court noted that it was well settled "that the scope of appellate review on a summary judgment order is limited to matters presented to the District Court." The *Keelan* court specifically found that failure to object to the prima facie case formulation waives the issue for appellate review.

Since the Petitioner has failed to preserve this issue for appellate review the Petition for Writ of Certiorari should be denied.

II. The District Court Properly Applied the *McDonnell Douglas* Shifting Burden Test and Found No Credible Evidence of Intentional Discrimination on Behalf of any Decision Maker, Nor was there Evidence of Pretext.

At the trial level both the Magistrate Judge and the District Court Judge thoroughly analyzed the undisputed facts and applied those facts to the prima facie case analysis. Both the District Court and the Magistrate Judge found that the Plaintiff had not established a prima facie case with regards to his 42 U.S.C. § 1981 discrimination claim and that the Plaintiff had not satisfied the fourth prong of the *McDonnell Douglas* shifting burden test. Both the District Court and the Magistrate Court found that the Plaintiff had not satisfied his prima facie case with regards to his § 1981 retaliation claim. The Plaintiff failed to meet his burden of proof with regards to the fourth element of the prima facie case because he failed to identify a comparator. The District Court addressed pretext only after determining the prima facie case had not been met and this analysis was only presented as an alternative ground for upholding the summary judgment grant. Even if the Petitioner had proved a prima facie case

Superior had articulated a legitimate, nondiscriminatory reason for the termination.

There is no evidence in the record that the Defendant's legitimate, nondiscriminatory reason for terminating the Petitioner was anything other than the Defendant's stated reason: in the face of business slow down, the company's management determined that it would phase out temporary employees whenever possible rather than terminating permanent employees. The Petitioner argued in his objections to the Magistrate's Report and Recommendation that there was evidence in the record contradicting this non-discriminatory reason; however, this evidence was not presented to the trial judge other than in a blanket statement.

On appeal to the Fourth Circuit the Petitioner parsed the deposition testimony of one of the Respondent's employees and made another blanket assertion that the deposition testimony was evidence of pretext. The deposition testimony which the Petitioner relies on was not contradictory to the affidavit testimony which was before the trial court. The Petitioner's claim that any pretext existed in this case is simply not supported in the record.

CONCLUSION

For the reasons set forth above, Defendant/Respondent respectfully requests that the Petition for a Writ of Certiorari filed by Plaintiff/Petitioner be denied.

Respectfully submitted,

MARK W. BUYCK, III
E. LLOYD WILLCOX, II*
WILLCOX, BUYCK
& WILLIAMS, P.A.
P.O. Box 1909
Florence, SC 29503-1909
(843) 662-3258

Attorneys for Respondent

* *Counsel of Record*